

Lai Ah Fatt v Timbalan Menteri Dalam Negeri, Malaysia & Anor

HIGH COURT (PENANG) — CRIMINAL APPLICATION
NO 44-7-90
EDGAR JOSEPH JR J
15 MARCH 1990

Preventive Detention — Detention under Dangerous Drugs (Special Preventive Measures) Act 1985 — Revocation of order — Fresh order issued pursuant to ss 6(1) and 11B(2) — Whether minister authorized to make fresh order — Whether conditions precedent to making of fresh order under s 6(1) satisfied — Whether order that is invalid can be revoked — Dangerous Drugs (Special Preventive Measures) Act 1985, ss 6(1), 11A, 11B(1) & (2)

The applicant, who had been detained for two years under the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act'), had his detention order extended for another two years under an order dated 15 August 1989 to commence on 17 August 1980. On 13 January 1990, the minister, in purported exercise of his powers under s 11B(1), revoked the extension order and, at the same time, issued a fresh detention order dated the same day under s 6(1) read with s 11B(2) ('the fresh detention order') for a further period of 20 months with effect from the date thereof. The applicant applied for a writ of habeas corpus, and argued that:

- (i) a gap exists in s 11B(1) in that although s 11B(2) purports to authorize the minister to make a fresh detention order 'as is mentioned' in sub-s (1), there is nothing in sub-s (1) that expressly empowers him to do so;
- (ii) the fresh detention order was a new detention order and could only be validly made after the conditions precedent for the making of a detention order under s 6(1) had been complied with afresh;
- (iii) the minister had no power to revoke the extension order which was nullity because it was bad on its face.

Held, dismissing the application:

(1) Section 11B(1) brings in s 6(1) for it is under this section that the minister is empowered to make a detention order. The mention of a fresh detention order under s 11B(2) thus refers to a new detention order under s 6(1) unless a contrary intention appears either expressly or by necessary implication. No such contrary intention appears.

(2) The wording of ss 6(1) and sub-ss (1) and (2) of s 11B read together reveal a clear expression of Parliament's purpose that the minister has power to make a fresh detention order or extension order.

(3) It is clear that Parliament's intention in inserting s 11B(2) was to authorize the continued detention of a detainee who been illegally detained by the simple expedient of revoking any detention order, suspended detention order or extension order and at the same time making, while the detainee is still under detention, a fresh detention order or extension order, obviating the necessity for complying with the requirements of ss 3, 4 or 5 afresh.

(4) There is no necessity for a further compliance with the requirements of ss 3, 4 and 5, in issuing the fresh detention order. These requirements had been complied with prior to the making of the initial detention orders. The applicant has remained in detention since his arrest in 1987 and could not have been associated with any further activity of drug trafficking.

A There was also the affidavit of the Timbalan Menteri which stated that in issuing the fresh detention order, he did apply his mind to the facts of the applicant's case and all the information relating to the applicant submitted by the police and the report of the inquiry officer.

(5) There is nothing in s 11B(1) which indicates that the expression 'revocation' means only revocation of an order which is otherwise valid and operative; it includes cancellation of all orders, valid and invalid.

[*Editorial Note*: The applicant appealed to the Supreme Court vide Criminal Appeal No 05-30-90. The Supreme Court, comprising Abdul Hamid LP, Hashim Yeop A Sani CJ (Malaya), Lee Hun Hoe CJ (Borneo), Gunn Chit Tuan and Jermuri Serjan SCJJ, allowed the appeal on 3 May 1990. The judgment of the Supreme Court appears in this issue at p 297.]

Cases referred to

- 1 *Wong Ah Kau v Menteri Hal Ehwal Dalam Negeri & Anor* [1990] 2 MLJ 227 (not folld)
- 2 *IRC v Ayrshire Employers Mutual Insurance Association Ltd* [1946] 1 All ER 637 (refd)
- 3 *Ibrahim Bachu Bafan v State of Gujarat* AIR 1985 SC 697 (refd)
- 4 *AG v Prince Ernest Augustus of Hanover* [1957] AC 436 (refd)
- 5 *H Das v District Magistrate Cuttack & Anor* AIR 1969 SC 43 (refd)
- 6 *B Hembram & Ors v State of West Bengal & Ors* AIR 1974 SC 2279 (refd)

Legislation referred to

Dangerous Drugs (Special Preventive Measures) Act 1985 ss 3, 4, 5, 6(1)(a), (b), 11(A)(1), 11B(1), (2)

Gooi Hock Seng (*M Athimulan* with him) for the applicant.
Balia Yusof (Senior Federal Counsel) for the respondents.

Cur Adv Vult

Edgar Joseph Jr J: The Timbalan Menteri Dalam Negeri, Malaysia, the first respondent herein, acting under s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act'), had made an order dated 14 August 1987 for the detention of the applicant for a period of two years with effect from 18 August 1987, on the ground that he was satisfied that the applicant had been or was associated with activity relating to or involving the trafficking of dangerous drugs and that it was necessary in the interest of public order that the applicant be detained. The applicant was consequently detained for a period of two years but his detention was extended for another two years commencing on 17 August 1989 and ending on 16 August 1991 by virtue of an order of the Timbalan Menteri dated 15 August 1989 ('the extension order').

On 13 January 1990, the Timbalan Menteri, in purported exercise of his powers under s 11B(1), revoked the extension order and, at the same time, issued a fresh detention order dated the same day purportedly under s 6(1) read together with s 11B(2) ('the fresh detention order') authorizing the detention of the applicant for a further period of 20 months with effect from the date

thereof. In these circumstances, the applicant, through his solicitors, had caused to be issued a notice of motion praying for an order that a writ of habeas corpus should issue and that he be set at liberty.

All references to sections in this judgment shall, unless the context otherwise requires, be to the Act.

Before me, counsel for the applicant had assailed the fresh detention order on a number of grounds. In the first place, it was contended that the Timbalan Menteri was not authorized to make the fresh detention order under s 6(1) read together with s 11B(2). To understand this submission, it is necessary to reproduce the provisions of s 6(1) and sub-ss (1) and (2) of s 11B; they read as follows:

6(1) Whenever the Minister, after considering

- (a) the complete report of investigation submitted under subsection (3) of section 3; and
- (b) the report of the inquiry officer submitted under subsection (4) of section 5,

is satisfied with respect to any person that such person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs, the Minister may, if he is satisfied that it is necessary in the interest of public order that such person be detained, by order (hereinafter referred to as a 'detention order') direct that such person be detained for a period not exceeding two years from the date of such order.

11B(1) Notwithstanding anything contained in this Act, the Minister may at anytime revoke any detention order made under subsection (1) of section 6, or any restriction order made under subsection (3) of section 6, or any suspended detention order, or any direction under subsection (1) of section 11A for the extension of the duration of any such order, if he deems it just or fit to do so.

(2) Any revocation under subsection (1) shall be without prejudice to the validity of the order or direction before its revocation or to anything done thereunder, or to the power of the Minister to make a fresh order or to give a fresh direction as is mentioned under subsection (1) in respect of the person against whom the order or direction which is revoked was made or given.

I note that s 11B(2) was inserted by Act A 707 which came into force on 15 July 1988 and is to be deemed an integral part of s 11B as from the date of the commencement of that section.

It was argued, in effect, that although s 11B(2) purports to confer power on the minister to make a fresh order or to give a fresh direction *as is mentioned under sub-s (1)*, nowhere in sub-s (1) is there express provision empowering him to do so. The result was that there was a gap in s 11B(1) which only Parliament but not the court could fill — so it was said. In support, reliance was placed on the recent judgment of my brother Mohamed Dzaiddin J in *Wong Ah Kau v Menteri Hal Ehwal Dalam Negeri & Anor.*¹

I recognized that if the language of s 11B(2) fails to achieve its apparent purpose, I must decline to insert

words or phrases which might succeed where the draftsman has failed. (See *IRC v Ayrshire Employers Mutual Insurance Association Ltd*² per Lord Simonds.)

Before I embark upon a consideration of the specific issue which arises for decision regarding this part of the case, there are certain general observations I should like to make. At times a state of war appears to exist between the courts and the Parliamentary draftsman. The courts decline to come to the rescue although the *casus omissus* or gap in the statute can easily be provided for because it is said the courts have no power to amend the statute. It is, of course, axiomatic that although the courts have no power to amend a statute, they may read in words which it can be inferred was what the legislature meant to insert. As has been well put by EA Driedger, in his book *Construction of Statutes* (2nd Ed, 1983, Toronto) at p 101:

It is one thing to put in or take out words to express more clearly what the legislature did say, or must from its own words be presumed to have said by implication, it is quite another matter to amend a statute to make it say something it does not say, or to make it say what it is conjectured that the legislature could have said or would have said if a particular situation had been before it.

But here, for reasons I shall presently state, I found it unnecessary to resort to an implied extended meaning in order to construe the words of s 11B because, in my view, they are patently clear.

The Act is designed to provide for a scheme of preventive detention subject to certain conditions precedent. Briefly, it provides, in the first place, for the initial arrest without warrant by a police officer (s 3(1)) followed by detention pending inquiries for a maximum period of 60 days (s 3(2)). During this period, there has to be a police investigation (s 4) followed by a complete report of the results thereof to be submitted to an inquiry officer (s 3(3)(a)) and to the minister (s 3(3)(b)). The inquiry officer will conduct an inquiry (s 5(2)) and submit his own report to the minister (s 5(4)). The minister, if satisfied as to the matters referred to in the first paragraph of this judgment, may make a detention order but not later than the moment of expiry of the 60-day period aforesaid, directing that the detenu be detained for a period not exceeding two years from the date of the order (s 6(1)). The detenu is, however, provided with certain safeguards such as the right to make representations to the Advisory Board (s 9(1)) and he may, of course, resort to the remedy of judicial review but only on procedural grounds (s 11(c)).

The Act goes on to confer the power upon the minister to revoke, inter alia, any detention order or extension order, if he considers it just or fit to do so, and it goes on to provide that he may make, inter alia, a fresh detention order as mentioned in s 11B(1) against the detenu in respect of whom the detention order or extension order had been revoked (s 11B(1) and (2)).

Now, it is too well settled to need citation of authority that unless a contrary intention appears either expressly or by necessary implication, words used in a statute should be given the same meaning, and this canon of construction applies a fortiori where the words occur in two limbs of the same section. (See *Ibrahim Bachu Bafan v State of Gujarat*³ per Misra J at p 700 col 1 para 7.) It is also well settled that words in a statute cannot be read in isolation for their colour and content are derived from their context. As Lord Somervell put it in *A-G v Prince Ernest Augustus of Hanover*⁴ at p 473:

The key to the opening of every law is the reason and the spirit of the law — it is the 'animus imponentis', the intention of the lawmaker ... Hence, to arrive at the true meaning of any particular phrase in a statute, that particular phrase is not to be viewed detached from its context in the statute: it is to be viewed in connection with its whole context ...

It was with the above principles in mind that I turned to consider the submission of counsel for the applicant that there is a *cassus omissus* or gap in s 11B(1). Now, the words in s 11B(2) which mention the power of the minister to make 'a fresh order or to give a fresh direction as is mentioned under subsection (1)' brings in s 11B(1), which, it will be recalled, confers power on the minister to revoke, inter alia, a detention order or an extension order made against a detenu. Section 11B(1) in turn brings in s 6(1) for it is under this latter provision that the minister is empowered to make a detention order against a detenu. The words 'detention order' must be given the same meaning throughout the Act; that is to say, the meaning appearing in s 6(1). When, therefore, s 11B(2) speaks of a fresh detention order, it must refer to a new detention order under s 6(1) unless a contrary intention appears either expressly or by necessary implication. Having regard to the context concerned, no such contrary intention appears. This demonstrates that the wording of s 6(1) and sub-s (1) and (2) of s 11B when read together reveal a clear expression of Parliament's purpose that the minister has power to make a fresh detention order or extension order authorizing continued detention for a period not exceeding two years. Any other conclusion would, it seems to me, frustrate that purpose thereby rendering s 11B(2) moribund, dead and wholly inoperative.

Looking back, it is obvious that Parliament's purpose in inserting s 11B, in particular, the saving provisions of s 11B(2), was to authorize the *continued detention* of a detenu who had been illegally detained by the simple expedient of revoking any detention order or any suspended detention order or any extension order and, *at the same time* making — while he is *still under detention* — a fresh detention order or extension order, thus obviating the necessity for complying with any of the requirements of ss 3, 4 or 5 afresh. However, I hasten to remark, but only in passing and without deciding the point, that these

A measures do not appear to bar a claim for damages in respect of the period of wrongful detention.

B Accordingly, I was not prepared to hold that 'the legislature had plainly misfired' (per Lord Macmillan in *IRC v Ayrshire Employers Mutual Insurance Association Ltd*⁵ at p 641). Instead, I had proceeded, in accordance with Lord Diplock's extrajudicial retort, that 'if the courts can identify the target of Parliamentary legislation their proper function is to see that it is hit; not merely to record that it has been missed'. (See *Courts and Legislators* (1965, Birmingham) at p 10, reprinted in B Harvey (ed), *The Lawyer and Justice* (1978, London) 265 at p 274.)

C In the second place, it was argued that the fresh detention order made was, for all purpose, a new detention order and could only be validly made after the conditions precedent for the making of a detention order under s 6(1) had been complied with afresh. In other words, there had to be a fresh police investigation, a fresh complete report of investigation by the police officer, a fresh inquiry and a fresh report by the inquiry officer in accordance with ss 3, 4 and 5 respectively.

E I regret I found this submission unacceptable. It was common ground that prior to the making of the detention order dated 14 August 1987, there had been compliance with the requirements of ss 3, 4, 5, 6(1)(a) and (b). It was also common ground that the applicant has *remained in custody ever since his arrest* on 18 August 1987 to the present day; he could not, therefore, since his arrest, be associated with any further activity relating to or involving the trafficking of dangerous drugs. There is also the affidavit of the Timbalan Menteri stating that in exercising the powers conferred upon him by issuing the fresh detention order he did apply his mind to the facts of the applicant's case and all the information relating to the conduct and activities of the applicant submitted by the police and also the report of the inquiry officer pursuant to the provisions of s 5(4). It seemed to me that to require a further compliance with the requirements of ss 3, 4 and 5 would be a pointless pantomime. But, had the detenu been released upon revocation of the extension order and if it was intended to *re-detain* him *all* the requirements of ss 3, 4, 5 and 6(1) would have had to be complied with afresh.

I A final point was taken by counsel for the applicant and it was this. It was said that the minister had no power to revoke the extension order which was a nullity because it was bad on its face. The short answer to this was that there is nothing in s 11B(1) which indicated that the expression 'revocation' means only revocation of an order which is otherwise valid and operative; apparently it includes cancellation of all orders invalid as well as valid. (See *H Das v District Magistrate Cuttack & Anor*⁵ and *B Hembram & Ors v State of West Bengal and Ors.*⁶) Accordingly, this objection also failed.

If followed, therefore, that this application was dismissed as also were application nos 50-89, 4-90, 28-90, 31-90, 34-90, 40-90, 43-90, 80-90 and 7-90 wherein the same contentions were relied upon and which it had been agreed by counsel therein should abide the result of the present application.

Applications dismissed.

Solicitors: *Shan & Gooi.*

Reported by *Zarinah Marican*

Sarawak Commercial Banks Association v Sarawak Bank Employees' Union

HIGH COURT (KUCHING) — ORIGINATING MOTION NO
KG 10 OF 1989
HAIDAR J
9 FEBRUARY 1990

Administrative Law — Error of law — Whether lack or excess of jurisdiction — Grant of certiorari — Whether jurisdiction of court limited by ouster clause — Formula for computation of CPI increase — Whether justifiable — Industrial Relations Act 1967, s 30(7)

An employment dispute between the applicant and the respondent was referred by the Minister of Labour to the Industrial Court for adjudication, and Award No 56 of 1989 was handed down. The respondent applied for an order of certiorari to remove the case into the High Court for the purpose of quashing a portion of the award made by the Industrial Court on the grounds that:

- (a) a retrospective order effective from 1 January 1988 made by the Industrial Court was in breach of s 30(7) of the Industrial Relations Act 1967; and
- (b) the biased computation of CPI increase in the Award No 9 of 1989 was used as authority to apply to the present award.

Held, dismissing the application:

(1) The word 'may' in s 30(7) of the Industrial Relations Act 1967 is to be read as discretionary, and at the most directory, since the restriction imposed on the power to make the award retrospectively is applicable only in cases where the parties do not agree on the effective date of the agreement. Further, if the implementation date in respect of rates of pay is not the same as the other matters, it would lead to absurdity as the rates of pay to a certain extent hinge on the other matters. In addition, it does not make it extraordinarily difficult for the applicant to keep the industry going by such a retrospective order (earlier by two weeks).

(2) The Industrial Court has the power to make a retrospective order of the award though restricted to not earlier than six months from the date on which the dispute was referred to the Industrial Court. At most, there is only an error of law committed by the Industrial Court which does not go to lack or excess of jurisdiction.

A (3) The error committed by the Industrial Court in this case constitutes an error of law on the face of the record and effectively ousts the jurisdiction of the High Court to quash the part of the award.

B (4) As regards the computation of the CPI increase, the findings of the Industrial Court cannot be said to be so perverse and so devoid of plausible justification that no reasonable body of persons could have reached it. It is to be noted that the Industrial Court was not computing on an absurd percentage though it could make errors in the computation. What the Industrial Court did was to be consistent in its computation and not depart from its earlier computation, which the applicant wanted the Industrial Court to do. The Act does not specify the formula for the computation on the rates of pay and the legislature thought it best to leave it to the Industrial Court to find the basis for such computation.

Cases referred to

- 1 *Malayan Commercial Banks Association v National Bank Employees* (Award No 9/89) (unreported) (refd)
- 2 *Sabah Banking Employees' Union v Sabah Commercial Banks' Association* [1989] 2 MLJ 284 (folld)
- 3 *Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors* [1981] 1 MLJ 238 (not folld)
- 4 *Non-Metallic Mineral Products Manufacturing Employees' Union v Malaya Glass Factory Bhd* [1985] 1 MLJ 129 (refd)
- 5 *Hotel Equatorial (M) Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers & Industrial Court of Malaysia* [1984] 1 MLJ 363 (folld)
- 6 *Federal Hotel Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers* [1983] 1 MLJ 175 (dstd)
- 7 *Malayawata Steel Bhd v Union of Malayawata Steel Workers* [1978] 1 MLJ 89 (not folld)
- 8 *Malayan Commercial Banks Association v National Union of Bank Employees* [1981] 2 MLJ 183 (refd)
- 9 *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturers Employees Union & Ors* [1980] 2 MLJ 165 (folld)
- 10 *Re Dunlop Estates Bhd* [1981] 1 MLJ 249 (folld)
- 11 *Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 3 MLJ 204 (refd)

Legislation referred to

- G Industrial Relations Act 1967 ss 13(3), 26(2), 30(5), (7), 33, 33B(1), 56(2)(c)

TM Varughese (ST Sulong with him) for the applicant.

KP Gangadharan (ST Wong with him) for the respondent.

Cur Adv Vult

H **Haidar J:** The Sarawak Commercial Banks Association ('the applicant') filed an application by way of notice of originating motion (encl 7) for:

I An order for certiorari to remove into this court for the purpose of its being quashed that part of the award relating to art 19 — rates of pay — on pp 3 to 8 and on p 14 and appendices 1 and 2 in the first schedule of Industrial Court Award No 56 of 1989.

The grounds as set forth in the copy of the statement filed on 25 May 1989 are:

- (i) the order made in art 19(2) on p 14 of the award is in breach of s 30(7) of the Industrial Relations Act 1967,